No. 77-1359

# In the Supreme Court of the United States

OCTOBER TERM, 1978

UNITED STATES OF AMERICA, PETITIONER

*v.*

KIMBELL FOODS, INC., ET AL.

*ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT*

## REPLY BRIEF FOR THE UNITED STATES

**WADE H. McCREE, JR.,**
*Solicitor General,*
*Department of Justice,*
*Washington, D.C. 20530.*

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## I

Respondent and amicus curiae National Commercial Finance Conference, Inc., urge this Court to affirm the decision of the court of appeals by applying the Uniform Commercial Code (U.C.C.) provisions on lien priority to contests between federal contractual liens and private consensual liens. Respondent states that the court of appeals "has correctly applied [the U.C.C.] as the appropriate means

for determining priorities between competing consensual creditors" (Resp. Br. 10; see also *id.* at 9). Amicus, stating that the court of appeals "adopt[ed] one aspect of the Code to resolve the question in this case," urges this Court to embrace "complete reliance upon the perfection and priority rules of Article 9 * * *" as the rule of law governing cases such as this (Amicus Br. 24; see generally *id.* at 22–30).[1]

But the court of appeals, in according priority to respondent's lien, did not adopt the priority rule of the U.C.C. It expressly held back from doing so. On the ultimate question of "the substantive content of the 'first in time, first in right' rule with regard to future advances" (Pet. App. 26A), the court considered three rules followed by various states prior to enactment of the U.C.C., one of which—the rule freely allowing relation-back of optional future advances—was the rule adopted by the U.C.C. (Pet. App. 27A–28A & n.17). "[I]n crafting federal common law for this case," the court found no need to do more than determine that

[1] Amicus cites (Br. 23) cases in which, it claims, the courts have applied the U.C.C. as the "federal law merchant." Other than *United States* v. *Wegematic Corp.*, 360 F.2d 674 (2d Cir. 1966), the cited cases either arose in the Fifth or Ninth Circuits, which have rejected the choate lien doctrine in any event, or did not involve the United States as a party or did not apply the U.C.C.

*Wegematic* involved the choice of a federal rule when a federal contractor claims excuse for failure to perform a contract. The court of appeals that decided *Wegematic* has since expressly refused to abandon the choateness requirement for federal contractual liens. *United States* v. *General Douglas MacArthur Senior Village, Inc.*, 470 F.2d 675 (2d Cir. 1972), cert. denied, 412 U.S. 922 (1973).



respondent's lien would relate back "under either the actual notice rule or the U.C.C. rule" (Pet. App. 28A). The court observed that "[s]trong policy arguments favoring greater protection for the SBA counsel adoption of the actual notice rule while equally strong considerations * * * urge adoption of the U.C.C. rule," and it reserved "the final resolution of this difficult decision for another day" (Pet. App. 28A n.18).

Thus, respondent and amicus are urging this Court to adopt a rule that the court below considered but deliberately avoided adopting in this case.

There are important reasons why this Court should not adopt, as a rule of federal common law affecting contractual liens of the United States, the U.C.C. rule on relation-back of optional future advances.[2] As the court of appeals recognized, "strong policy arguments" support protection for federal liens; if those arguments are to be rejected, and the property interests of the United States subordinated to competing interests, Congress should make that decision. Like the federal tax liens protected by this Court through the choateness doctrine in cases such as *Security Trust* and *City of New Britain*,[3] a federal contractual lien is a vested federal property interest that should not be reduced or

[2] The Court also should not adopt the picking-and-choosing approach of the court of appeals, which abandons the well-established choateness rule in favor of ad hoc uncertainty and gives inadequate protection to federal property interests. See our main brief at 37–51.

[3] *United States* v. *Security Trust & Savings Bank*, 340 U.S. 47, 51 (1950); *United States* v. *City of New Britain*, 347 U.S. 81, 85–86 (1954); see our main brief at 16–25.

superseded by state law rules of priority unless Congress so provides.[4]

When Congress in the 1966 Federal Tax Lien Act (26 U.S.C. 6323) did consider and alter the priorities of federal tax liens, it rejected the approach of adopting the U.C.C. or other state law and instead fashioned its own rules (see our main brief at 47–49). Of particular pertinence here, Congress dealt specifically with the subject of liens for future advances. It gave such liens priority over federal tax liens only to the extent that the future advances are made within 45

[4] This is particularly clear where, as here, the state law would create priority for the non-federal lien by providing that optional advances made subsequent to attachment of the federal lien "relate back" to obtain a security interest dating from before the federal lien. With respect to private consensual liens competing with federal tax liens, this Court has refused to apply "the long since rejected relation-back doctrine." *United States* v. *Pioneer American Insurance Co.*, 374 U.S. 84, 92 n.11 (1963). Absent congressional intervention, the doctrine equally deserves rejection when applied to undercut federal contractual liens. There is, indeed, an Alice in Wonderland quality about some of the relation-back claims of respondent and amicus. For instance, amicus argues (Br. 36) that a future-advancing party such as respondent should not have "to speculate whether a junior security interest may someday be created and sold to the government and be catapulted to senior status through the retroactive application of the choateness doctrine." It is not easy to relate this statement to the facts that the $300,000 loan to O.K. Super Markets by the Bank—which enabled O.K. to pay off its existing indebtedness to respondent—was made and secured, and the SBA's guarantee of that loan was known to respondent, not "someday" but *before* respondent made the optional future advances of inventory for which respondent now claims a lien prior to that of the bank loan. See also, *e.g.*, Amicus Br. 28, 42–43.



days of the filing of the tax lien and before receipt of actual notice of that filing. 26 U.S.C. 6323(c)(2)(A); see W. T. Plumb, *Federal Tax Liens* 92 (1972).[5] Thus, Congress adopted the "actual notice" rule, and it further placed a strict time limit on the future advances that would be protected against the prior federal tax lien. In contrast, under the U.C.C. rule that respondent and amicus urge this Court to adopt, any future advances made to the debtor by respondent would take priority over the federal contractual lien securing a loan made before the advances. See Texas Bus. & Com. Code 9.312(e)(1) and Comment, Example 4: *id.*, 9.204(e) (1968); *id.*, 9.312(g) (1978 Supp.) (Texas U.C.C.). The U.C.C. rule would subordinate federal contractual liens to a much greater extent than Congress was willing to subordinate federal tax liens. If such a waiver of federal property interests is to take place, Congress, not this Court, should make the decision.[6]

[5] In addition, the competing lien loses its priority with respect to new collateral acquired by the borrower more than 45 days after the filing of the tax lien. 26 U.S.C. 6323(c)(2)(B); W. T. Plumb, *supra*, at 92 (1972).

[6] This conclusion draws further support from the provision of the Small Business Act, 15 U.S.C. 646, in which Congress in 1958 considered the priority of SBA liens and withdrew that priority only as against state and local liens for property taxes (see our main brief at 33–37). Amicus quotes from the SBA's 1958 letter to Congress (Amicus Br. 11) the inadvertently incorrect statement that the priority of the United States under the insolvency statute, 31 U.S.C. 191, "is not applicable to property which is subject to a lien of any kind." Compare the decisions of this Court cited in our main brief at 18–19 nn.

## II

Respondent and amicus see dire consequences from application of the choate lien doctrine to cases such as this (Resp. Br. 11; Amicus Br. 7, 28). They foretell

(Continued)

15–19; see also, *e.g.*, *City of Sherman* v. *United States*, 400 F.2d 373, 377 (5th Cir. 1968). The statement is in any event irrelevant here. The SBA letter went on to propose the bill which was enacted as 15 U.S.C. 646 and which provided, without reference to the insolvency statute, that any security interest of the SBA shall be subordinate to any state or local lien for property taxes that would take priority under local law if the SBA lien were held by a private party. In so proposing, the SBA Administrator noted the recent decision of the Third Circuit in *United States* v. *Ringwood Iron Mines, Inc.*, 251 F.2d 145 (1958), holding "that a mortgage lien held by the United States stands in the same position as a tax lien held by the United States * * *." *Hearings on Credit Needs of Small Business Before a Subcomm. of the Senate Comm. on Banking and Currency. 85th Cong., 2d Sess.* 554 (1958). The decision in *Ringwood Iron Mines* was expressly based on this Court's decision in *United States* v. *City of New Britain*, 347 U.S. 81 (1954), which definitively reaffirmed the choateness doctrine (*id.* at 84, 86–87).

Thus the 1958 statute waived in favor of state and local property tax liens the priority to which SBA liens were entitled under the first-in-time and choateness rules. As the court of appeals acknowledged (Pet. App. 21A n.13)—though the court chose a different view (*ibid.*)—"[t]his statute could be read as ameliorating the impact of the choateness doctrine by waiving the immunity it would grant, thus implicitly recognizing the applicability of the choateness doctrine to SBA liens." Moreover, the action of Congress in 1958 in specifically addressing the question of SBA lien priority and removing that priority in only a narrow and precisely tailored fashion, like its action in the Federal Tax Lien Act of 1966, underlines the inappropriateness of this Court's revamping on a wholesale basis the priorities of SBA liens and of federal contractual liens generally.



"a severe curtailment of credit by the non-government lending sector and attendant severe economic dislocation" (Resp. Br. 11). More particularly, they contend that "a lender providing revolving credit secured by accounts receivable or inventory" will be required, on learning of the government's involvement in a loan to the debtor, "to terminate financing and liquidate its collateral to preserve its priority position," with the usual result of "destroying the borrower's business" and causing irreparable injury to the lender as well (Amicus Br. 7).

These fears are extravagantly overdrawn. The choate lien doctrine has been the law for many years, both with respect to federal tax liens under this Court's decisions and with respect to federal contractual liens under the decisions of most of the circuits (see our main brief at 26–27 and 39 n.43), without evidence of any adverse consequence to lenders or borrowers. In 1950 this Court first applied the choateness rule to determine the priority of federal tax liens (*United States* v. *Security Trust & Savings Bank*, 340 U.S. 47, 51); and amicus states (Br. 6) that "[t]he annual volume of financing by the commercial finance and factoring industry has increased from approximately $5,000,000,000 in 1950 to over $70,000,000,000 in 1970." This is not the record of an industry crimped and oppressed by a hostile rule of law. Neither amicus nor respondent has offered any evidence—and the SBA is aware of none (see our main brief at 43 n.49)—suggesting that commercial lending in jurisdictions applying the choateness rule has been inhibited

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or reduced in comparison with jurisdictions not applying that rule, or reporting any ill effects during the decade when the rule prevailed in the Fifth Circuit itself.[7]

As for the lender who is providing revolving credit secured by accounts receivable or inventory and discovers that the government is lending money to the same debtor, there is no cause, so long as he contemporaneously receives notes or comparable instruments evidencing specific amounts of definite indebtedness, for him to fear for the priority of advances he made before the government entered the picture. See *Crest Finance Co.* v. *United States,* 368 U.S. 347, (1961); cf. W. H. Plumb, *Federal Tax Liens* 64 (1961), citing Rev. Rul. 56–41, 1956–1 Cum. Bull. 562. With respect to optional future advances, the lender can evaluate the borrower's financial position in light of both the infusion of funds from the government and the security interest taken by the government, and on that basis can determine whether to continue making advances.

In this case, for example, the $300,000 bank loan to O.K. Super Markets in February 1969 that was guaranteed by the SBA—as Kimbell knew it was guaranteed—enabled O.K. to pay off the approximately $25,000 it then owed Kimbell and subsequently to pay Kimbell more than $18,000 for new inventory over the next two years, while incurring a new balance of some $18,000 on open account (see our main

[7] Compare *United States* v. *Roessling*, 280 F.2d 933 (5th Cir. 1960), with *Connecticut Mutual Life Insurance Co.* v. *Carter*, 446 F.2d 136 (5th Cir.), cert. denied, 404 U.S. 857 (1971).



brief at 5). These events took place prior to June 1971, when the Fifth Circuit in the *Connecticut Mutual* case (446 F.2d 136) rejected the choateness doctrine which it had espoused in the 1960 *Roessling* case (280 F.2d 933). That doctrine thus apparently did not deter Kimbell from making future advances with knowledge of the government's involvement. Nor do these facts seem atypical. To the extent that the government's financial assistance serves its intended purpose of improving the financial standing of the borrower, the private lender should find it no less attractive to do business with the borrower after the government makes its secured loan than before.[8]

Amicus states (Br. 6) that secured lenders "know that their security interests will be inferior to earlier perfected liens and security interests" and "therefore review the appropriate public records to determine the relative priority of their security interests in the collateral."[9] If this is so, it is hard to see why a lender/supplier such as Kimbell in this case should be preju-

[8] If the private lender is really unwilling to advance funds to a borrower who might subsequently obtain federal financial assistance involving a federal security interest, the lender can condition its own loan on a requirement that the borrower obtain the private lender's consent before accepting federal financial assistance.

[9] But cf. Note, *Priority of Future Advances Lending Under the Uniform Commercial Code*, 35 U. Chi. L. Rev. 128, 143 (1967): "it has been repeatedly stated that in practice lenders seldom check public records for claims on the borrower's assets. Instead, they rely on credit-rating services to supply information about financial standing." (Footnote citing authorities omitted.)

diced or deterred by a rule of law giving priority to a secured bank loan that Kimbell knew the SBA had guaranteed, and that was perfected and recorded before Kimbell made the advances for which it here claims priority. Perhaps, however, amicus and respondent would say it is inconvenient for a creditor or supplier to search the public records regularly, in order to ascertain whether there is an intervening federal lien, before making advances. But any such inconvenience apparently already exists, since federal tax liens continue to take priority over most subsequent advances (see pages 4–5, *supra*), and regular searches must be made for such liens.[10] Moreover, the same necessity prevailed under this Court's earlier decisions applying the choateness doctrine in the context of federal tax liens, and lenders nevertheless succeeded in protecting themselves. See W. T. Plumb, *Federal Tax Liens* 64 (1961). A lender's reluctance to take steps—or have its credit agency take steps—to determine whether it is dealing with the federal government before it makes additional advances thus is not an adequate reason for abandoning the choate lien doctrine and the federal interests that it protects.[11]

[10] The inconvenience may be minimal, however, if lenders rely on credit agencies to do the searching. See note 9, *supra*.

[11] Lenders must also contend with other liens that may intervene after the initial financing agreement is perfected and take priority over future advances, such as state or local tax liens or mechanic's or repairman's liens accorded superpriority by local law. There is no evidence that these have appreciably deterred the growth of commercial financing or revolving credit.



## III

Confronted with the unanimous authority in the courts of appeals prior to the Federal Tax Lien Act of 1966 applying the first-in-time and choateness rules in the context of federal contractual liens (see our main brief at 26), and the adherence to those rules by the great majority of the courts of appeals since the 1966 Act (see *id.* at 27 and 39 n. 43), respondent and amicus attempt to distinguish these cases. They claim, first, that the decisions do not reflect application of the choateness doctrine because the same result could have been reached by applying the first-in-time rule alone (Resp. Br. 7–8; Amicus Br. 10, 19).

But the first-in-time rule cannot be applied without corollary rules for determining the time when a lien is created, and the courts of appeals have expressly chosen the choateness rule for this purpose.[12] In a number of the cases, application of the state rule instead would have rendered the non-federal lien first in time.[13] It was therefore not surplusage when these

[12] *E.g.*, *Willow Creek Lumber Co.* v. *Porter County Plumbing & Heating, Inc.*, 572 F.2d 588, 591 (7th Cir. 1978); *Chicago Title Insurance Co.* v. *Sherred Village Associates*, 568 F.2d 217, 222 (1st Cir. 1978), petition for cert. pending *sub nom. Hercoform, Inc.* v. *Chicago Title Insurance Co.* (No. 77–1611); *T. H. Rogers Lumber Co.* v. *Apel*, 468 F.2d 14, 18–19 (10th Cir. 1972); *United States* v. *Oswald & Hess Co.*, 345 F.2d 886, 888 (3d Cir. 1965); *In re Lehigh Valley Mills, Inc.*, 341 F.2d 398, 401 (3d Cir. 1965).

[13] See, *e.g.*, *Chicago Title Insurance Co.* v. *Sherred Village Associates*, *supra*, 568 F.2d at 219 (contract executed before federal mortgage would have priority under state law); *T. H.*

courts stated that they were applying the choate lien test to determine which lien was first in time.

Respondent and amicus also claim to find it significant (Resp. Br. 8; Amicus Br. 19, 21) that none of the court of appeals cases applying the choate lien doctrine have involved a federal contractual lien and "a competing mortgage or perfected security interest created under Article 9 of the U.C.C." (Amicus Br. 19). But the reasoning of the decisions leaves little doubt that the courts of appeals applying the choate lien rule in the context of federal contractual liens would not distinguish between competing private liens created by particular statutes and competing private "consensual" liens created under the U.C.C. These courts have generally reasoned that the choate lien doctrine should be applied with respect to federal contractual liens by virtue of the authority and the reasoning of this Court's cases applying the doctrine with respect to federal tax liens.[14] And this Court in apply-

*Rogers Lumber Co.* v. *Apel*, *supra*, 468 F.2d at 16, 18 (lien for materials furnished before federal lien attached would have priority under state law); *In re Lehigh Valley Mills, Inc.*, 341 F.2d 398, 401 (3d Cir. 1965), reversing 225 F. Supp. 494, 496 (E.D. Pa.) (corporation taxes vested under state law before federal lien perfected).

[14] See, *e.g.*, *United States* v. *General Douglas MacArthur Senior Village, Inc.*, *supra*, 470 F.2d at 678–679; *T. H. Rogers Lumber Co.* v. *Apel*, *supra*, 468 F.2d at 20; *Director of Revenue, State of Colorado* v. *United States*, 392 F.2d 307, 312–313 (10th Cir. 1968); *United States* v. *Oswald & Hess Co.*, *supra*, 345 F.2d at 888; *United States* v. *County of Iowa*, 295 F.2d 257, 259 (7th Cir. 1961); *United States* v. *LATrobe Construction Co.*, 246 F.2d 357, 365 (8th Cir. 1957).

While dicta in *Chicago Title* suggest that the First Circuit might distinguish between privately-held secured interests and



ing the doctrine in that context has not distinguished between private statutory and private consensual liens. As amicus concedes (Br. 16–17), the Court has regularly applied the choate lien test to non-federal liens that arose by the consent of the parties. *United States* v. *Pioneer American Insurance Co.*, 374 U.S. 84 (1963); *Crest Finance Co.* v. *United States*, 368 U.S. 347 (1961); *United States* v. *Ball Construction Co.*, 355 U.S. 587 (1958).

The purpose of the choate lien doctrine is to prevent the government's vested property interests from being superseded by later-arising interests, and the source or nature of the non-federal interest is not determinative of whether it was certain and perfected at the time the federal lien attached.[15]

statutory liens because it views the U.C.C. as providing a usable, uniform rule (568 F.2d at 222), that court's basic rationale, that changes in "this arena of complex relationships" are best left to Congress (568 F.2d at 221), would appear to be at odds with such a distinction.

[15] Respondent asserts (Br. 11–12) that *Aquilino* v. *United States*, 363 U.S. 509 (1960), precludes application of the choate lien doctrine here. That case held that state law controlled the question "whether and to what extent the taxpayer had 'property' or 'rights to property' to which the tax lien could attach" (*id.* at 512). The Court went on to make it clear (*id.* at 513–514) that "once the tax lien has attached to the taxpayer's state-created interests, we enter the province of federal law, which we have consistently held determines the priority of competing liens asserted against the taxpayer's 'property' or 'rights to property'" (citing, *e.g.*, *United States* v. *Security Trust & Savings Bank*, *supra*, 340 U.S. 47, and *United States* v. *City of New Britain*, *supra*, 347 U.S. 81). In this case the question is the priority of competing liens attaching to admitted property rights, and as *Aquilino* recognized, that question is controlled by federal law.

## IV

A. Respondent and amicus argue (Resp. Br. 13–14; Amicus Br. 37–41) that respondent's lien was choate at all relevant times and therefore has priority. They contend that the amount of the lien was certain because, like the amount of the debts evidenced by the notes in *Crest Finance Co.* v. *United States, supra,* 368 U.S. 347, it could be determined "from the books and records of the parties" (Amicus Br. 39; see Resp. Br. 13–14). They assert that "no judgment is required to make a fixed contractual debt of this kind certain in amount" (Amicus Br. 40).

*Crest Finance,* in which the government conceded that the competing lien was choate, and the Court agreed, is not the controlling precedent here. In *Crest,* nine loans were made, each evidenced by the taxpayer's note. Memorandum for the United States in *Crest Finance, supra,* at 3. While a substantial part of the aggregate principal amount of the notes had been repaid by the taxpayer (*ibid.*), this fact was evidently considered irrelevant, receiving no consideration in either the Memorandum for the United States or the opinion of the court of appeals (291 F.2d 1). The basis for the government's concession that the lien was choate was that "the notes" rendered the "amount



of the lien" specific and definite.[16] The assignments that constituted the collateral "were made to secure payment of notes in specific amounts for loans made contemporaneously with the assignments" (*id.* at 5). The lien "was for the liquidated amount of the notes evidencing the loans from petitioner to the taxpayer" (*id.* at 6). Thus, in *Crest,* the lienor had advanced money to the taxpayer, and the amount of the lien was specifically and definitely evidenced by the face value of notes signed by the taxpayer.

Here, notwithstanding the reference by amicus to "the notes in this case" (Br. 39), the future advances for which respondent claims a prior lien were not evidenced by any notes. Nor was their amount evidenced by any comparable documents signed by the debtor.[17] Further, the advances were not of money,

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[16] "Thus the lien fully met the requirements, enunciated by this Court, that it be specific and definite in three essential respects: (1) the identity of the lienholder (petitioner); (2) the amount of the lien (the notes); and (3) the property to which it attaches (the accounts receivable for the work already performed under the specific contract). *E.g., United States* v. *New Britain,* 347 U.S. 81." Memorandum for the United States, *supra,* at 5.

[17] Respondent says the amount owed was "at any given instant * * * a fixed liquidated sum established by the difference between the aggregate of the sums advanced by Kimbell Foods, Inc. to O.K. Super Markets and the aggregate repayments by O.K. Super Markets to Kimbell Foods, Inc." (Br. 13–14).

The Court of appeals said that Kimbell had terminated extensions of credit so that its accounts reflected the final amount of the claim secured by its security agreements with O.K." Pet. App. 24A n.14.

but of sales of inventory (Resp. Br. 3). In these circumstances, quite apart from any payments O.K. had made on the account, the amount of the lien was not specific and definite because Kimbell's claim was subject to a variety of defenses and uncertainties: the amount and composition of the inventory in fact delivered, the correctness and reasonableness of the price, the amount and value of defective or returnable items, the accuracy of the bookkeeping, and various other factors. The supplying of a wide variety of goods on open account through repeated deliveries over an extended period, as here, is very different, with respect to the definiteness of the amount owned, from loans of money evidenced by notes signed by the debtor and bearing face amounts.

The present case is analagous to the cases involving liens for attorneys fees, which this Court has held to be inchoate until reduced to judgment or set by a court. See *United States* v. *Pioneer American Insurance Co., supra,* 374 U.S. 84; cf. *United States* v. *Equitable Life Assurance Society,* 384 U.S. 323 (1966). There, as here, there is no advance agreement or evidence with respect to the amount owed. Services or goods are provided or supplied, and their value or price is recorded on the books of the provider or supplier, but the reasonableness of the amount charged is open to dispute, possibly on a number of grounds, by the person whose property is subject to



the lien.[18] In contrast, the signatory of a note such as those in *Crest Finance* is bound to repay the face amount of the note, absent fraud or other extraordinary circumstances. We therefore submit that respondent's lien was not analagous to the lien in *Crest Finance,* but was required to be reduced to judgment before it became choate; this did not occur until after the SBA-guaranteed loan was made and after the Bank's security interest was assigned to the SBA.

B. Finally, respondent and amicus argue (Resp. Br. 3–4; Amicus Br. 30–36) that the SBA's lien dates only from February 1971, when the SBA made good its 90% guaranty of the Bank's loan,[19] instead of from February 1969, when the Bank made the SBA-guaranteed loan and filed the financing statement securing it. This argument does not aid respondent because, for the reasons we have just outlined, respondent's lien did not become choate until it was reduced to judgment in February 1972.[20]

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[18] In *United States* v. *Pioneer American Insurance Co., supra,* the attorney had provided some services at the time the federal lien was filed; the final amount allowed by the state court "set the fee considerably below the sum requested." These unliquidated attorneys fees were held to be inchoate at the time the tax lien was filed.

[19] The Bank assigned its security interest to the SBA on December 30, 1970, and the assignment was filed on January 21, 1971 (see our main brief at 5–6).

[20] Amicus is therefore incorrect in asserting (Amicus Br. 30) that "SBA's claim in this case depends upon its assertion that the choateness of Kimbell's security interest must be measured as of February, 1969, when the Bank's security interest was perfected."

In addition, the SBA's interest is properly measured from the filing of the Bank's financing statement in February 1969. The court of appeals correctly so held (Pet. App. 26A), citing *United States* v. *Eklund*, 369 F. Supp. 1052, 1054–1055 (S.D. Ill. 1974).[21] Amicus relies (Br. 34–35) on cases construing the Bankruptcy Act and the insolvency statute (31 U.S.C. 191), including *United States* v. *Marxen*, 307 U.S. 200 (1939). In *Marxen*, this Court held that where the government guarantees a loan but accepts assignment of it only after the borrower becomes insolvent or bankrupt, the government is not entitled to its special bankruptcy priority or to its priority under 31 U.S.C. 191; instead, it takes only the priority to which the assignor was entitled.

Those cases, however, construe statutes that specifically require rights to be frozen as of the time of insolvency or bankruptcy. See *United States* v. *Marxen, supra*, 307 U.S. at 207; *United States* v. *Oklahoma*, 261 U.S. 253, 259–260 (1923). There is no comparable statutory requirement in this case. And equitable considerations favor dating of the government's lien from the date when the guaranteed security agreement is filed, since the government's obligation on the guarantee is fixed as of that date. Cf.

[21] Contrary to amicus's suggestion (Br. 33), the *Eklund* case did involve assignment to the SBA of an interest in a loan guarantee, in addition to direct participation in the loan by the SBA. The court accorded both SBA interests priority as of the dates of the original guarantee and the participation by the SBA. See 369 F. Supp. at 1054–1055.



*United States* v. *Summerlin*, 310 U.S. 414, 417 (1940).[22]

In any event, respondent should not be permitted to deny that the SBA's lien attached at the time the Bank's financing satement was filed, since respondent had actual notice of the SBA's role in guaranteeing the Bank's loan at the time the loan was made. See our main brief at 3–4, 52 n.58; App. 61–64.[23] In the Federal Tax Lien Act of 1966, even the limited priority that Congress gave to future advances made within 45 days after the filing of the tax lien is withheld if the "lender or purchaser had actual notice or knowledge of such tax lien filing." 26 U.S.C. 6323(c)(2)(A). Assuming that the policy of that Act has significance beyond the area of tax liens, the policy should be applied here to prevent respondent from taking priority over the SBA with respect to advances it made to O.K. after it had actual notice that the SBA was guaranteeing the secured loan from the Bank.

[22] In contrast, respondent was under no obligation to make the future advances that it did make subsequent to the Bank's loan.

[23] The court of appeals recognized that "Kimbell was aware of Republic's lien and—so the record suggests—the SBA's guaranty of the loan the lien secured" (Pet. App. 28A–29A; footnote omitted). Yet the court reasoned (*id.* at 29A) that under the Texas U.C.C., "this notice could not affect Kimbell's decision whether to advance funds because under state law its advances were secured by and took the priority of the 1966 and 1968 security agreements." This reasoning appears to beg the question whether the applicable rule on relation-back of future advances is the U.C.C. rule or the "actual notice" rule—a question the court expressly left open (Pet. App. 28A & n.18).

## CONCLUSION

For the foregoing reasons and the reasons given in our main brief, the judgment of the court of appeals should be reversed.

Respectfully submitted.

WADE H. MCCREE, JR.,
*Solicitor General.*

JANUARY 1979.

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